IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE TWENVTH DAY OF AUGUST
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE V.V.S.RAO

WRIT PETITION NO : 10260 of 2004

Between:

K.S.V.Raja S/o K.V.Ranga Rao
6-12-18, Main Road, Narsapur-534 275
West Godavari District,

..... PETITIONER

AND

1 Union of India, Represented by its General manager
South Central Railway, Rail Nilayam
Secunderabad
2 Chief Engineer Construction
South Central Railway,
Secunderabad
3 Deputy Chief Engineer Construction-I
South Central Railway, Vijayawada
4 Ch.Suresh Contractor
4-3-2/5, Tarvanipeta Mandapeta
East Godavari Dist

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue any appropriate writ order or direction more particularly one in the nature of Writ of Mandamus declaring the action of the Respondents 1 to 3 in accepting the tender of the 4th Respondent in respect of the work of "Improvements to circulating area on both sides of KaKinada Town Station and Construction of Second Banking office on Westside of Kakinada Town Station " in pursuance of tender Notice No.04/Dy.CE/C4/BZA/2004 dt.04/03/2004 of the 3rd Respondent as illegal and void and consequently declare that the Petitioner is entitled for the acceptance of his tender and award of the said work.

Counsel for the Petitioner:MR.A.RAMALINGESWAR RAO

Counsel for the Respondents 1 to 3: MR.S.R.Ashok, Senior Counsel,

representing MR.Gouri Shankar Sanghi, Standing Counsel for South Central Railway

Counsel for the Respondent No.4: Sri V.Prasada Rao

WRIT PETITION NO : 10262 of 2004

Between:

K.S.V. Raja, S/o. K.V. Ranga Rao
6-12-18, Main Road, Narsapur

West Godavari District.

..... PETITIONER

AND

1 Union of India, rep. by its General Manager, South Central Railway, Rail Nilayam, Secunderabad.
2 Chief Engineer, Construction, South Central Railway, Secunderabad.
3 Dy. Chief Engineer, Construction-1, South Central Railway,

Vijayawada.
4 P. Siva Prasad, Contractor, 12-13-483/28/1, Nagarjunanagar,

Tarnaka , Sec'bad.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue any appropriate Writ, Order or Direction more particularly one in the nature of a Writ of Mandamus declaring the action of the Respondents 1 to 3 in accepting the tender of the 4th Respondent in respect of the work of “proposed improvements to the existing station building and other passenger amenities at Kakinada Town Station " in pursuance of tender Notice No. 04/Dy. CE/C4/BZA/2004 dt.04.03.2004 of the 3rd respondent as illegal and void and consequently declare that the petitioner is entitled for the acceptance of his tender and award of the said work .

Counsel for the Petitioner:MR.A.RAMALINGESWAR RAO

Counsel for the Respondents 1 to 3: MR.S.R.Ashok, Senior Counsel, representing MR.Gouri Shankar Sanghi, Standing Counsel for South Central Railway

Counsel for the Respondent No.4: Sri V.Prasada Rao

The Court made the following :

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NOs.10260 AND 10262 OF 2004

COMMON ORDER:

The two Writ Petitions are filed by one K.S.V.Raja of Narsapur in West Godavari District challenging the action of respondents 1 to 3 in accepting the tender of fourth respondent for the works for which tenders were invited. As the controversy arises in relation to the same Notice Inviting Tenders (NIT), and the grounds of challenge and the defense of the impugned action is the same, the two Writ Petitions are being disposed of by this common order.

Third respondent, who is Convenor of the Tender Committee of South Central Railway, issued NIT dt.4.3.2004 inviting tenders for three works. We are concerned with two works, namely, (i) Restoration of BG line between Kakinada Town and Kotipalli. Proposed improvements to the existing station building and other passenger amenities at Kakinada Town Station (hereafter called, work-1) and (ii) Improvements to circulating area on both sides of Kakinada Town Station and

construction of second booking office on West side of Kakinada Town Station (hereafter called, work-2). The approximate value of work-1 is Rs.1,65,26,455/- (Rupees one crore sixty five lakhs twenty six thousand four hundred and fifty five only) and that of work-2 is Rs.66,16,836/- (Rupees sixty six lakhs sixteen thousand eight hundred and thirty six only).

NIT consists of nine conditions. Condition Nos.1.1 to 1.10 deal with eligibility criteria and credentiality of tenderers. As per condition No.9 last date for closing of tender box and for opening of tender box is 12.4.2004. The petitioner herein submitted tender for works 1 and 2. The tenders were opened by the Tender Committee consisting of three persons. It was found that the petitioner became lowest tenderer in respect of both the works. Accordingly, the Tender Committee recorded its proceedings and recommended to second respondent; the tender accepting authority. The second respondent rejected the tender of the petitioner for both the works and accepted the tender of fourth respondent. The petitioner therefore filed these two Writ Petitions contending that the tender submitted by the petitioner is lowest, that he has legitimate expectation for getting the contract and that the respondents have acted arbitrarily in accepting the tender of fourth respondent. Be it noted that the letter of acceptance was issued to fourth respondent on 15.6.2004 and the agreement was entered into on 26.7.2004. These facts are not disputed.

A common counter affidavit is filed on behalf of respondents 1 to 3. The averments in counter are as follows. The three-man Tender Committee consisting of Deputy Chief Engineer, Deputy Chief Accounts Officer and Deputy Chief Signal and Telecommunications Engineer caused review of the tenders and submitted their report to the accepting authority opining that the petitioner's tender was valid and should be considered for awarding contract. However, second respondent on a consideration of relevant pre-qualification clause set out in tender schedule opined that petitioner does not satisfy the requirements as to qualification and experience as the case may and therefore petitioner's tender cannot be included for consideration. Second respondent also opined that it was wholly not feasible to execute work at the rate quoted by petitioner and hence it was not pragmatic to award contract to such tenderer, who could not properly estimated or valued the subject work. Accordingly, the tendering authority decided to award contract to the lowest eligible tenderer who is the fourth respondent. The decision was taken by the second respondent on consideration of relevant facts and the decision is bona fide. The opinion of the Tender Committee is not binding on the accepting authority and after considering all the tenders accepting authority gave cogent reasons for differing with the view point of the Tender Committee. Even if the rates quoted by fourth respondent are marginally higher, it would not be pragmatic to entrust the work to petitioner at the rates quoted by him.

The fourth respondent in the counter affidavit states that he has executed similar nature of work more than the qualified work and accordingly competent authority accepted his tender. The action of the respondents does not suffer from any impropriety. He also stated that after receiving acceptance letter he has commenced work on 19.6.2004 and invested an amount of Rs.20,00,000/- (Rupees twenty lakhs

only) towards material and labour. As per the terms of the contract, he is required to commence work within seven days from the date of acceptance letter and complete within six months. Therefore, he has deployed 2 JCBs, 4 tippers, 2 tractors, 3 vibrators, 1 weigh batcher and employed about 35 labourers. He purchased necessary granite, steel, cement, aluminum channels for doors, centering material and stone for foundations and compound wall. He further stated that he has completed the work of clearing of the area of 300 x 30 meters, completed the compound wall upto plinth level, completed excavation work and work of laying foundation was started besides other work. He also stated that petitioner has not executed any work of similar nature more particularly either on functioning track or station and he does not possess the experience advertised in NIT.

The petitioner also filed reply affidavits in both the Writ Petitions denying various allegations in the counter affidavits. As the affidavits filed by petitioner as well as respondents contain similar pleadings, it is not necessary to refer to these in other Writ Petition.

Learned counsel for petitioner in both the Writ Petitions, Sri A.Ramalingeswara Rao, submits that when the Tender Committee accepted the tender of the petitioner as more responsive, the rejection of the tender by second respondent is arbitrary and illegal. He would urge that petitioner is duly qualified as per Clause 1.1 of NIT and therefore the action of the respondents is illegal. Secondly he would urge that the respondents negotiated only with fourth respondent which is unfair and discriminatory. Lastly, the learned counsel contends that the fourth respondent has no requisite experience and therefore the acceptance of fourth respondent tender is illegal and arbitrary. He relied on decisions in **AIR India Ltd. v. Cochin International Airport Ltd., West Bengal Electricity Board v. Patel Engineering Corporation Ltd**. **Aroma Enterprise v. Murshidabad Zilla Parishad,Godavari Polymers Pvt. Ltd v. Agricultural Products Commissioner & Principal Secretary, Agriculture, Cooperation (Horticulture) Department, Government of Andhra Pradesh, M/s.Sargous Tours & Travels v. Union of India** in support of his submissions.

Sri S.R.Ashok, learned Senior Counsel appearing for respondents 1 to 3 submits that having regard to language of Condition No.1 of NIT second respondent has taken a decision that the petitioner lacks qualification and therefore decision of the Tender Committee was not accepted. He would also submits that when the Writ Petition was filed, the General Manager of South Central Railway also sent for file and after verifying the file, and detailed opinion of the Chief Engineer (Construction) he was satisfied that tender process does not suffer from any unfairness. Learned Senior Counsel has placed before this Court the original files containing the experience certificates enclosed by petitioner to contend that the petitioner has no qualification for being considered for award of contract. He would submit that as per Clause 1.1 the petitioner was required to have completed the work for a minimum value of Rs.57.84 lakhs in respect of work-1; and Rs.23.15 lakhs for work-2 and an analysis of experience certificate produced by petitioner would show that the same

is lacking. He relied on **Raunaq International Ltd. v. I.V.R. Constructions** in support of his submissions.

Learned counsel for fourth respondent Sri Prasada Rao submits that the petitioner has no pre-qualifications, that the fourth respondent has already completed substantial amount of work for which he was already partly paid and that in the absence of any gross arbitrariness this Court may not interfere in this type of contractual matters.

In the light of the pleadings and rival submissions the only point that would arise for consideration is whether the action of the second respondent in accepting the tender of the fourth respondent (in both the Writ Petitions) would not suffer from vice of illegality, arbitrariness and unreasonableness.

It is now well settled that the exercise of contractual powers by the State is amenable to the power of judicial review under Article 226 of the Constitution of India. It is also well settled that while exercising contractual powers, the State must adhere to the principles of equality and ensure that fairness is meted out to all the participants in the tender process. If the action of the tendering authority is illegal or arbitrary, either in accepting or rejecting the tender, it can always be corrected by this Court. While subjecting the decision of the tendering authority to judicial scrutiny, the two important factors cannot be ignored. These are (i) when the offers are evaluated by Committee of Experts with special knowledge, the decision plays an important role and the price offered is only one of the criteria; (ii) if the accepting authority or tendering authority has understood the conditions of the tender in proper perspective and has applied the same equally to all the tenderers in fair and transparent manner even if there is possibility of second opinion, the Court should not interfere in the matter. The above principles are well settled and it is not necessary to refer to all the authorities in support of these principles. The point for consideration needs to be considered in the background of these principles.

Condition No.1 of NIT insofar as relevant reads as under:

1.0. Eligibility Criteria and Credentials of the Tenderer:

1.1 “For All the Items of works” the tender should have completed at least one similar single work viz., “Building/Earthwork and minor bridges/Major Bridge/Side Drains/Works” for a minimum value of 35% of advertised tender value of work in the three financial years preceding to the date of tender opening (after 1.4.2004).

1.3 The total contract amount received during the last three years and in the current financial year should be a minimum at 150% of advertised tender value of work. The tender is required to submit current ITCC or certificate from the employer/client or Audited Balance Sheet duly certified by a Chartered Accountant to this effect with regard to turnover.

1.6 The works executed by the tender for Government Departments or Semi Government Departments/Public Sector Undertaking shall only be considered for eligibility. Works executed for private parties SHALL NOT BE considered. The experience certificate shall be issued by a Junior Administrative Grade Officer of Superintending Engineer or equivalent grade in other departments indicating therein the name of works executed, value of works and period during which completed, bills paid etc. The Certificate should bear the signature and seal of the Office and attested by Railway Officer (Gazetted).

1.7. The Experience Certificate submitted by the tenderer should indicate the following information.

a. Date of Commencement of Work

b. Date of Completion of Work, if completed

c. Value of work executed after 1.4.2001

d. Value of the Building Work executed.

If the tenderer fails to submit the above information the tender will be rejected and considered invalid. No correspondence will be entertained after opening of the tender with the tenderer.

1.8. The value of the work completed will not include the cost of any materials issued free of cost by the Railways/Department concerned. Only cash value of the agreement and executed cash value will reckon for eligibility.

What are the eligibility criteria of a contractor to submit his tender? Condition Nos.1.1. and 1.3 would be relevant. A plain reading of these two sub-clauses and analysis of the same would lead to the following.

(a) To be eligible for tendering for all the items of works a tenderer must have "completed" at lease one "similar single work" in the three financial years preceding 1.4.2004; (b) such completion must be in relation to building work, earth work and minor bridges, major bridges and side drains work (though there is a slash mark between side drains and works, it should be read as side drains work); (c) the value of such "similar single completed work" must be at least equivalent to 35% of the advertised tender value, that is to say for work-1 contractor must have completed "similar single work" in three financial years to the tune of Rs.57.84 lakhs for work-1; and for work-2, must have completed the work for value of Rs.23.15 lakhs; (d) the total contract amount received by tender during the last three years should be minimum of 150% of the advertised tender value of the work.

If the tenderer has not completed "similar single work" namely, building/earth work and minor bridges/major bridges Side Drains Works, such offer of the tenderer cannot be considered as eligible tender. The respondents do not deny that the petitioner satisfies Condition No.1.3. The contention is that the petitioner does not satisfy the eligibility criteria as mentioned in Condition No.1.1. For this purpose they relied on nine experience certificates submitted by petitioner along with tenders for work-1 as well as work-2. These certificates are issued either by Executive Engineer, Roads and Buildings (R&B) or Executive Engineers, Panchayat Raj of various divisions. The certificate dated 14.6.2003 issued by Executive Engineer, R&B, Bhimavaram Division, relates to the work executed during 2002-2003. The same is in relation to work described as improvements to Mutyalapalli - Mollaparru Road from Km.0/0 to 10/200 in West Godavari District, and the value of the work done is Rs.1,29,11,602/-. This is a consolidated figure in respect of twelve items of work out of which earth work and RCC pipe works, total value of which comes to Rs.15.70 lakhs was considered by the respondents. Another certificate dt.16.4.2002

issued by Executive Engineer, R&B, Narsapur Division is for the period 2001-2002 which shows that the petitioner has completed work of construction of computer block at KVR Degree College at Mogaltur for Rs.7,42,020/-. All other works, which are covered by other certificates issued by Executive Engineer, Panchayat Raj of various Divisions, are in relation to work of construction of roads under Prime Minister's Grameena Sadhak Yojana (PMGSY) under different phases. Yet another certificate dt.12.4.2004 issued by Executive Engineer, Panchayt Raj Division, Machilipatnam shows that during the year 2001-2002 the petitioner constructed Mandal Parishad office building at Pamarru, total value of which is Rs.17,49,000/-. After perusing these certificates with the assistance of the learned Senior Counsel, I am convinced that the petitioner does not satisfy the eligibility criteria as per Condition No.1.1 of NIT. Even if two items of work in the certificate dt.14.6.2003 covered by certificate issued by Executive Engineer, R&B, Bhimavaram Division, and the work covered by item No.2 of the certificate issued by Executive Engineer, Panchayat Raj Division, Machilipatnam, dt.27.4.2002 are taken, the petitioner still falls short of 35% of advertised tender value of the work. Thus, the analysis of the experience certificate furnished by the petitioner shows that the petitioner did not have experience in works of similar nature which is mandatory requirement according to conditions of NIT. The decision was taken by the accepting authority dictated by rationality and other relevant considerations and therefore such decision does not suffer from any unreasonableness or arbitrariness.

This Court has also perused the original files and tender documents submitted by fourth respondent in Writ Petition No.10262 of 2004. The fourth respondent in Writ Petition No.10262 of 2004 along with his tender documents has produced a large number of certificates issued either by Divisional Engineers, South Central Railway, Deputy Chief Engineer (Construction), Chief Engineer (Construction)-III and IV. These would show that he has completed the work, namely, conversion of track from meter gage to broad gage in relation to minor bridges and earthwork. Similarly fourth respondent in Writ Petition No.10260 of 2004 has furnished experience certificate dt.5.3.2004, issued by Commissioner of Mandapeta Municipality which shows that he has completed construction of shopping complex at Eastern side of Municipal Park in Mandapeta during the year 2002-2003. The value of the work is Rs.37,64,360/-. A perusal of this certificate would show that he satisfies the eligibility criteria.

It is no doubt true that as contended by the learned counsel for the petitioner the tender committee by its proceedings came to the conclusion that the petitioner satisfies the eligibility criteria. While doing so they considered the work of construction of road which was undertaken by petitioner, and came to the conclusion that it is a similar work. Whereas, the second respondent came to the conclusion that the work done by petitioner is not of similar nature. Having regard to the language used in Condition 1.1 of NIT and also having perused the material, it must be held that certificates produced by petitioner are not in respect of similar single work. It is nobody's case that recommendation or opinion of the tender committee is binding on the accepting authority. Accepting authority independently analysed the experience

certificates of petitioner and rightly came to the conclusion that he does not satisfy the eligibility criteria. In that view of the matter, it must be held that the tender submitted by petitioner work-1 and work-2 was rightly held as not responsive to the tender conditions. The decision does not suffer from any infirmity, much less illegality or arbitrariness.

In the result, for the above reasons, it must be held that the Writ Petition is devoid of any merit and is liable to be dismissed. It is accordingly dismissed. No costs.

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(V.V.S.RAO, J)

.8.2004

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ASSISTANT REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1 The General Manager,
South Central Railway, Rail Nilayam
Secunderabad
2 The Chief Engineer (Construction)
South Central Railway,
Secunderabad
3 Deputy Chief Engineer (Construction-I)
South Central Railway, Vijayawada
4. 2CD copies